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Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1993

JOHN P. DUNBAR JR.,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a reviewing court sets aside as unlawful under 5 U.S.C. § 7703(c)(2) a federal agency's action in removing an employee, is the Merit Systems Protection Board required by the Civil Service Reform Act and its own regulations to treat the removal action as void ab initio and of no effect, and to order the employee to be reinstated by the agency with back pay?

2. When the reviewing court, after setting aside a removal action as unlawful under 5 U.S.C. § 7703(c)(2), remands the matter to the Merit Systems Protection Board with directions "to have the decision to remove redetermined," does the Merit Systems Protection Board vio-

late the mandate of the reviewing court by merely reaffirming the agency's original removal action instead of further remanding the matter to the agency to have the action redetermined?

3. When one panel of the reviewing, federal appeals court sets aside an agency's removal action for harmful error under 5 U.S.C. § 7703(c)(2) and remands the matter to the Merit Systems Protection Board with directions "to have the decision to remove redetermined," and the Merit Systems Protection Board thereafter disregards those directions by reaffirming the agency's original removal action instead of further remanding the matter to the agency for a proper redetermination of such action, is a different panel of the same reviewing court, on a second appeal by the removed employee, bound by

the "law of the case" to enforce the first panel's mandate?

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OPINIONS BELOW

In an unpublished opinion, the Administrative Judge issued her first Initial Decision in this matter on June 25, 1990 (A-1), which became the final decision of the Merit Systems Protection Board (hereinafter the "Board" or "MSPB") by Order dated November 9, 1990 (A-40). This final decision of the Board was subsequently reversed by the United States Court of Appeals for the Federal Circuit in an unpublished Decision filed July 30, 1991 (A-43).

On remand from the Federal Circuit, the Board entered an unpublished Opinion and Order dated February 14, 1992, in turn remanding the matter to the Administrative Judge for further proceedings (A-49). The Administrative Judge thereafter

issued a second, unpublished Initial Decision on June 23, 1992 (A-52), which decision became the final decision of the Board by Order dated November 3, 1992 (A-110). This final decision was affirmed per curiam and without opinion by the Federal Circuit on July 9, 1993 (A-113).

JURISDICTION

The judgment of the Federal Circuit was entered on July 9, 1993 (A-113). The Federal Circuit denied the Petitioner's timely petition for rehearing by Order dated September 7, 1993 (A-115). Jurisdiction of this Court to review the judgment of the Federal Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The statutory provisions involved in this case are 5 U.S.C.A. § 7701(c)(2)(A) (West 1980) and 5 U.S.C.A. § 7703(c)(2) (West 1980), which provide:

> § 7701. Appellate procedures
>
> . . . .
>
> [(c)](2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision[.]
>
> * * *
>
> § 7703. Judicial review of decisions of the Merit Systems Protection Board
>
> . . . .
>
> (c) In any case filed in the United States Court of Appeals for the Federal Circuit,

> the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> . . . .
>
> (2) obtained without procedures required by law, rule, or regulation having been followed[.]

The regulatory provisions involved in this case are 5 C.F.R. § 752.404(f) (1993) and 5 C.F.R. § 1201.56(b)(1) (1993), which provide:

> § 752.404 Procedures.
>
> * * *
>
> (f) Agency decision. In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action. It shall consider any answer of the employee and/or his or her representative made to a designated official and any medical documentation furnished under paragraph (c) of this section. The agency shall deliver the notice

> of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights.
>
> * * *
>
> § 1201.56 Burden and degree of proof; affirmative defenses.
>
> . . . .
>
> (b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:
>
> (1) Shows harmful error in the application of the agency's procedures in arriving at its decision[.]

STATEMENT OF THE CASE

This petition involves an outrageous and ultra vires attempt by the Merit Systems Protection Board to revive and re-

affirm the Navy's action in firing the Petitioner from his job, even though that action had been set aside for harmful procedural error, and thereby entirely voided from its inception, by the reviewing court. Equally outrageous and irregular are the Board's refusal to follow the reviewing court's instructions on remand to further remand this matter to the Navy for a redetermination of the removal action and the reviewing court's refusal to enforce those instructions on a second appeal of this matter by the Petitioner.

On February 8, 1989, Petitioner John P. Dunbar Jr., an antiterrorism instructor for the United States Navy, GS-11,[1]

---

[1]As acknowledged by the Administrative Judge in both of her initial decisions (A-36, A-37, A-105), Mr. Dunbar and

was sent a "Notification of Proposed Removal" specifying three reasons for the proposed termination of his employment: (1) "Absence without leave (AWOL)/failure to follow absence and leave procedures"; (2) "Leaving the worksite without permission (Second Offense)"; and (3) "Insubordination/threatening a supervisor" (A-118). Mr. Dunbar was subsequently removed by a "Notification of Removal" dated March 8, 1989 from Lanny McCullah, the deciding official (A-123). In the removal notice, McCullah wrote:

> Your violent outburst and aggressive behavior in this instance, coupled with a May 17,

---

at the time of his removal had a satisfactory performance record and many years of exemplary service in the Reserves. He had also been commendated by the San Diego Chief of Police for his action in apprehending a suspected criminal (A-36, A-105, A-128).

> 1988 allegation of solicitation for murder, for which you were placed on administrative leave, and your continued harassment of your co-workers, leads me to conclude that the charge of insubordination/threatening a supervisor alone, is reason enough to sustain your removal.

(A-125 (emphasis added).) Aside from not being included in the Notification of Proposed Removal, the charge of solicitation of murder had been investigated and found to be without substance prior to the March 8, 1989 date of the removal notice (A-45).

On April 3, 1989, Mr. Dunbar appealed his termination to the Merit Systems Protection Board (MSPB) (A-2), and on April 18 and 19, 1990 a hearing was conducted before an Administrative Judge (AJ) appointed by the MSPB. On June 25, 1990, the AJ issued her Initial Decision

affirming the agency's action in removing Mr. Dunbar (A-1, A-37). On August 8, 1990, Mr. Dunbar filed a petition for review of the AJ's decision with the MSPB, which summarily denied said petition on November 9, 1990 without addressing any of Mr. Dunbar's legal contentions (A-40, A-41).

Mr. Dunbar thereafter appealed the MSPB's final decision to the Federal Circuit Court of Appeals pursuant to 5 U.S.C.A. § 7703(b)(1). On July 30, 1991, the United States Court of Appeals for the Federal Circuit handed down its Decision vacating the decision of the MSPB (A-43, A-44). The Federal Circuit concluded that "[t]o the extent McCullah considered the solicitation of murder charge in arriving at his decision to re-

move Dunbar, as his removal states that he did, he erred" (A-47-48). The appeals court further ruled that "[u]nder the circumstances of this case, this error cannot be considered harmless and the MSPB finding to the contrary is not in accordance with [5 U.S.C.] § 7703(c)(2)" (A-48 (emphasis added)).[2]

The Federal Circuit therefore remanded the matter with the following directions:

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[2]5 U.S.C. § 7703(c)(2) requires the Federal Circuit to set aside agency actions found to be obtained without procedures required by law, rule or regulation having been followed. Mr. Dunbar had alleged that the Navy violated 5 C.F.R. § 752.404(f), which states that "[i]n arriving at its decision, the agency shall not consider any reasons for action other than those specified in the [Notification of Proposed Removal]." The Federal Circuit specifically found that "no mention of the solicitation [of murder] charge appears in the Notification of Proposed Removal" (A-47).

> The MSPB is directed to have the decision to remove redetermined based on the issues raised in the "Notification of Proposed Removal" and the record that would have properly been before the deciding official, and without any consideration of the allegation of solicitation for murder.

(A-48 (emphasis added).)

On remand, however, the MSPB did not follow these directions by remanding the matter to the Navy to have the decision to remove Mr. Dunbar redetermined. Instead, by an Opinion and Order dated February 14, 1992, the MSPB remanded "the appeal" to the AJ "for further proceedings in accordance with the [Federal Circuit's] opinion" and "to ascertain the appropriate penalty" (A-50).[3] On June

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[3]Specifically, the MSPB directed the AJ to

10, 1992, over Mr. Dunbar's objection, the AJ conducted a second hearing "for the purpose of taking additional testimony from Deciding Official McCullah," as well as from two other U.S. Navy officials involved in the original removal process (A-58). On June 23, 1992, the AJ issued her second Initial Decision in the matter in which she concluded, directly contrary to the Federal Circuit's hold-

---

> take additional testimony as necessary from the parties and relevant witnesses and . . . make appropriate credibility determinations to ascertain the appropriate penalty based on the charges in the Notification of Proposed Removal and the record that would properly have been before the deciding official, without any consideration of the allegation of solicitation for murder, as directed by the court.

(A-50.)

ing, that "even though there was error, it was not harmful" (A-99).[4] She again affirmed the agency's removal action (A-108).

By Order dated November 3, 1992, the MSPB denied Mr. Dunbar's petition for review of the AJ's second Initial Decision (A-110), which thereupon became the MSPB's final decision in the matter. On July 9, 1993, a different panel of the

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[4]The AJ concluded as follows on the matter of harmful error:

> In sum, I find that absent Donaldson's erroneous inclusion of the solicitation for murder allegation in the decision letter, the evidence plainly shows that McCullah, the deciding official would have reached the same decision regarding the penalty. Thus, even though there was error, it was not harmful. See 5 C.F.R. § 1201.56(b).

(A-99.)

Federal Circuit affirmed the MSPB's decision per curiam and without opinion (A-113-14). On September 7, 1993, the Federal Circuit denied Mr. Dunbar's combined petition for rehearing and suggestion for rehearing en banc (A-115-16).

REASONS FOR GRANTING THE PETITION

1. Once "set aside" on appeal by the reviewing court, an agency's removal decision is void ab initio and cannot be reaffirmed by the MSPB. This petition presents a very important question of federal law concerning the duties of the MSPB upon the remand of a matter wherein the Federal Circuit Court of Appeals has "set aside" a federal agency's action in removing an employee for harmful procedural error under 5 U.S.C.A. § 7703

(c)(2). The language of the Civil Service Reform Act, its legislative history, and prior opinions of both the Federal Circuit and the former Court of Claims strongly indicate that, once the Federal Circuit has set aside an agency's removal action, the MSPB is under a duty to treat the removal decision as void ab initio and to order the removed employee reinstated with back pay. This Court should therefore grant the petition to decide this important issue and remedy the injustice done to Mr. Dunbar, who has been robbed of his victory in the reviewing court by the unauthorized and illegal actions of the MSPB.

Section 7703(c)(2) specifically mandates that the Federal Circuit "shall" hold unlawful and "set aside" any agency

action found to be "obtained without procedures required by law, rule, or regulation having been followed." 5 U.S.C.A. § 7703(c)(2). The term "set aside" has generally been defined by both federal and state courts as meaning to reverse, annul, cancel, vacate, void, or revoke. E.g., Migdol v. United States, 298 F.2d 513, 516 (9th Cir. 1961); Ambiance Associates v. Kilby, 230 Va. 60, 334 S.E.2d 556, 557 (1985); Washington v. Levinson, 66 Ohio App. 461, 35 N.E.2d 161, 163 (1941); see Black's Law Dictionary 1230 (5th ed. 1979). Thus, when an action is "set aside," it is "annulled and made void, just as if it had never been."

Migdol v. United States, supra, 298 F.2d at 516.[5]

While the legislative history of the Civil Service Reform Act does not shed much light directly on the meaning of the term "set aside" as used in § 7703(c), that history does make it clear that "agency actions should be reversed because the agency's procedures were in error only if the procedures followed sub-

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[5]Indeed, for purposes of the former Federal Youth Corrections Act, requiring the automatic "set aside" of a youth offender conviction under certain circumstances, 18 U.S.C. § 5021 (repealed 1984), this Court indicated that the term "set aside" was used in the sense of "expunged." See Tuten v. United States, 460 U.S. 660, 664-65, 665 n.9 (1983). See also United States v. Hidalgo, 932 F.2d 805, 807 (9th Cir. 1991), holding that a youthful offender conviction that was "set aside" under Cal. Welf. & Inst. Code § 1772 (West 1984) was "expunged" under federal sentencing guidelines and could not be included in determining criminal history.

stantially prejudiced the rights of the employees." S. Rep. No. 969, Pub. L. No. 95-454, 95th Cong., 2d Sess. 64 (1979) (emphasis added). Moreover, it is apparent that § 7703(c) was modeled after § 706(2) of the Administrative Procedure Act (APA), which provides that the reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law." See 5 U.S.C.A. § 706(2)(D) (West 1977) (emphasis added). As used in § 706(2), the term "set aside" has commonly been understood to mean "vacated" or "reversed." See, e.g., Camp v. Pitts, 411 U.S. 138, 143 (1973).

Moreover, the former Court of Claims expressed the view, albeit in dicta, that when a court decides to set aside agency

action as unlawful under § 7703(c), it is "required to remand the case to the Merit Systems Protection Board with instructions to determine the amount of back pay and related benefits due and to reinstate him." Brewer v. United States Postal Service, 647 F.2d 1093, 1099 & n.5 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982). Similarly, the Federal Circuit has directly held that it has the "same authority" under § 7703(c) and 28 U.S.C. § 1295(a)(9) to instruct the Board, on remand from a decision setting aside an agency removal action, to issue an order requiring reinstatement and payment of back pay and other benefits. Sullivan v. Department of Navy, 720 F.2d 1266, 1276 & n.3 (Fed. Cir. 1983). These holdings reflect the basic understanding of the

federal reviewing courts, up until the decision of the panel below, that a reviewing court's decision to set aside an agency's removal action voids that action from its inception, thus requiring the reinstatement of the removed employee with back pay and benefits.

In the case at bar, the first panel of the Federal Circuit to hear this case set aside the agency's removal action for harmful procedural error under § 7703 (c)(2). Upon the reviewing court's remand of the matter to the MSPB, the Board was accordingly under a duty to treat the removal action as void ab initio and to further remand the matter to the Department of the Navy for a redetermination of the voided action in accordance with the Federal Circuit's instructions. This

duty arose not only in view of the provisions of the Act, see 5 U.S.C.A. § 7701(c) (2)(A), providing that "the agency's decision may not be sustained . . . if the employee . . . shows harmful error in the application of the agency's procedures in arriving at such decision" (emphasis added), but also was dictated by the Board's own regulations. See 5 C.F.R. § 1201.56(b)(1) (requiring the Board to "overturn" an agency action if the appellant "[s]hows harmful error in the application of the agency's procedures in arriving at its decision"). By necessary implication, the Board was further required to make Mr. Dunbar whole by ordering him reinstated with back pay.

The Board violated these duties arising under the Civil Service Reform Act and its own regulations when it remanded the matter to the AJ to take additional testimony, make credibility determinations, and "ascertain an appropriate penalty" (A-50), and thereafter reaffirmed the Navy's original removal action. By continuing to treat the agency's removal action as capable of being reaffirmed, when in fact that decision had been set aside and entirely voided by the Federal Circuit's July 30, 1991 decision, the Board erred as a matter of law.

As the Board could not breathe life back into the voided removal action by its improper remand to the AJ, its decision to reaffirm the Navy's removal ac-

tion must likewise be set aside as unauthorized and unlawful. This Court should therefore grant the Petition to clarify the nature and scope of the Board's duties upon a remand from a reviewing court's decision setting aside an agency's removal action, as well as to correct the grave injustice that has been done Mr. Dunbar by the Board's refusal to treat the Navy's original removal action as a nullity following the Federal Circuit's July 30, 1991 decision setting aside that action.

2. The MSPB violated the law of the case by refusing to obey the mandate of the reviewing court. The decision of a federal appellate court establishes the law binding further action by another body subject to its authority. Briggs v.

Pennsylvania Railroad, 334 U.S. 304, 306 (1948); United States v. United States District Court, 334 U.S. 258, 263-64 (1948). This "law of the case" doctrine is as applicable in instances of remand to administrative agencies as it is with respect to remands to lower courts. Rios-Pineda v. United States Department of Justice, INS, 720 F.2d 529, 532 (8th Cir. 1983), rev'd on other grounds, 471 U.S. 444 (1985); City of Cleveland, Ohio v. Federal Power Commission, 561 F.2d 344, 346 (D.C. Cir. 1977).

Thus, an administrative agency is bound on remand to apply the legal principles laid down by the reviewing court. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 406 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S.

134, 145 (1940);[6] Chicago & Northwest Transportation Co. v. United States, 574 F.2d 926, 930 (7th Cir. 1978); Morand Brothers Beverage Co. v. NLRB, 204 F.2d 529, 532-33 (7th Cir.), cert. denied, 346 U.S. 909 (1953). An administrative agency is without power to do anything which is contrary to either the letter or the spirit of the mandate construed in the light of the appellate court's opinion. City of Cleveland, Ohio v. Federal Power Commission, supra, 561 F.2d at 346. Moreover, an administrative agency is without power to open or modify the judgment or order of the appellate court.

---

[6]This Court in FCC v. Pottsville Broadcasting Co., supra, stated that "[o]n review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction." Id. at 145.

Mefford v. Gardner, 383 F.2d 748, 758 (6th Cir. 1967). Deviation from the court's remand order in the subsequent administrative proceedings is therefore legal error, subject to reversal on further judicial review. Sullivan v. Hudson, 490 U.S. 877, 886 (1989).

In the case at bar, the MSPB clearly exceeded the scope of the Federal Circuit's mandate and thereby violated the law of the case. The July 30, 1991 decision of the Federal Circuit directed the Board to "have the decision to remove redetermined based on the issues raised in the 'Notification of Proposed Removal'" (A-48 (emphasized added)). When this language is construed in light of the Federal Circuit's opinion setting aside the Navy's removal action for harm-

ful procedural error under 5 U.S.C. § 7703(c)(2), it is crystal clear that the mandate required the Board to remand the matter to the Navy to allow it to "redetermine" the removal decision without consideration of the solicitation of murder charge.

Instead, the Board, by its remand to the AJ, purported to reopen and take additional testimony and evidence on the question of whether the Navy's consideration of the solicitation of murder charge constituted harmful procedural error, an issue of law already expressly decided and foreclosed by the Federal Circuit's decision. The Board thereafter reaffirmed the Navy's removal action based on the AJ's conclusion that "even though there was error, it was not harmful

error" (A-99). In effect, the Board improperly chose to ignore the Federal Circuit's decision "as if it had no force or effect." Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), cert. denied, 449 U.S. 975 (1980).

As "[t]his is intolerable if the rule of law is to prevail," 623 F.2d at 228, this Court should exercise its supervisory authority and grant the Petition to correct the Board's clear and unjust violation of the Federal Circuit's mandate.

3. The Federal Circuit violated the law of the case by refusing to enforce the mandate of a prior panel. It is well established that appellate reconsideration of issues that have already been decided in an earlier appeal is or-

dinarily foreclosed by the "law of the case" doctrine. E.g., Chicago & Northwest Transportation Co. v. United States, supra, 574 F.2d at 929. "While power rests in a federal court that passes on an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review." Insurance Group Committee v. Denver & Rio Grande Western Railroad, 329 U.S. 607, 612 (1947). As a rule a court "should be loathe" to revisit prior decisions of its own "in the absence of extraordinary circumstances." Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988).

In the instant case, the Federal Circuit did not even bother to articulate a single reason, let alone an "unusual" or "extraordinary" circumstance, justifying its departure from the opinion of the prior panel. Nor does the record of this case reveal any compelling reason for the Federal Circuit to refuse to enforce the mandate of the prior panel decision. As the Federal Circuit's decision thus violates the principles of the "law of the case" as laid down by this Court and the other federal circuit courts of appeals, this Court should grant the Petition to bring the Federal Circuit in line with this fundamental rule of law.

CONCLUSION

In view of the arguments and authorities set forth above, the Petitioner, John P. Dunbar Jr., respectfully requests that this Court grant this Petition and issue a writ of certiorari to the Federal Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JOHN P. DUNBAR, JR., Appellant,	)	DOCKET NUMBER SF07528910445-1
v.	)	
DEPARTMENT OF THE NAVY, Agency.	)	DATE: June 25, 1990

John P. Dunbar, Esquire, Honolulu, Hawaii, for the appellant.

John M. Shea, Esquire, Washington, D.C., for the agency.

BEFORE

Gretchen W. Thomas
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 3, 1989, appellant appealed his removal from the position of Training Instructor, effective March 11, 1989.[1] The Board has jurisdiction over the appeal. 5 U.S.C. §§ 7511-7513 and 7701(a).

For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Appellant was removed on charges of: 1) Absence without Leave(AWOL)/failure to follow leave procedures, 2) leaving the work site without permission, and 3) insubordination/threatening a supervisor.

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[1] On February 27, 1990, the Board held that appellant had shown good cause for the untimeliness of his appeal, and waiving the time limit, remanded the appeal for adjudication on the merits. *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640 (1990).

Charge 1

The specifications underlying Charge 1, allege that appellant was AWOL on January 23, 24, and 25, 1989, and that he failed to request leave in accordance with the agency's leave procedures. Appellant does not dispute that he was absent between January 23 and 11:00 a.m. on January 25. However, he maintains that he was sick during that time, that he notified his supervisor of his illness, and upon his return, presented medical documentation to support his absence. I find appellant's claims lacking in credibility. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987).

Hospital records submitted by appellant show that he was seen at the Coronado Hospital Emergency Room at 11:30 p.m. on January 19th and diagnosed as having purulent bronchitis. Medication

was prescribed for his condition and he was sent home. *See* Agency Exhibit 11. However, the documents give no opinion as to the seriousness or expected duration of appellant's condition.

At the hearing, appellant proffered a standard Application for Leave form requesting sick leave for the period from January 19 through 11:00 a.m. on January 25. The application, dated February 6, 1990, shows that on March 3, 1990, a Dr. F. X. O'Brien certified that appellant was under his care for the period indicated and that his condition made reporting to work inadvisable. I do not credit the leave request with probative value.

Appellant testified that the only medical care that he received for his bronchial condition was at Coronado Hospital on January 19. Yet, the attending physician's signature on the Coronado

medical records is clearly different from that of Dr. O'Brien. It appears to be of a Dr. J. Ammur (sic). Under the circumstances, I find that when Dr. O'Brien signed the certification on March 3, 1990, without having examined appellant during the relevant time period, he could not have reasonably opined whether appellant was incapacitated from duty approximately 5 weeks earlier on January 23-25. To arrive at an accurate diagnosis both medical history and physical examination are needed. *Cf. Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 418 (1981).

In addition, a United States Naval Reserves muster record shows that appellant reported, and was present, for reserve training on the week-end of January 20-22. Agency file, Tab I. Appellant admits that he had reported for reserve